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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-376

.....

LAKESIDE BRIDGE & STEEL CO.

Petitioner,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Respondent.

.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

.....

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September 4, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner Lakeside Bridge & Steel Co. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 30, 1979.

OPINION BELOW

The opinion of the court of appeals is reported at 597 F.2d 596 and appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Wisconsin on the issue of personal jurisdiction, the sole issue to which the court of appeals addressed itself. The district court's unpublished order also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 30, 1979. A timely Petition for Rehearing and Suggestion for Rehearing en Banc was denied on June 8, 1979. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

1. Whether, in an action which arises out of its contacts with the forum state, a nonresident corporate defendant who orders $1,281,750.00 worth of specially fabricated goods from a resident corporate plaintiff with knowledge that they were likely to be, and which were in fact, fabricated in the forum state by the plaintiff and were required to be shipped from the forum state by the plaintiff has sufficient minimum contacts with the forum state such that the assertion of personal jurisdiction over it is consistent with due process.

STATUTORY PROVISIONS INVOLVED

WIS. STAT. Section 801.11:

> **Personal Jurisdiction, Manner of Serving Summons For.** A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> * * *
>
> (5) Domestic Or Foreign Corporations, Generally. Upon a domestic or foreign corporation:
>
> (a) By personally serving the summons upon an officer, director or managing agent of the corporation either within or without this state. In lieu of delivering

the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

WIS. STAT. Section 801.05:

Personal Jurisdiction, Grounds for Generally. A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances...

(5) Local Services, Goods or Contracts. In any action which:

(a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or

* * *

(d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction;...

STATEMENT OF THE CASE

This is an action for breach of contract between two corporations: Lakeside Bridge & Steel Co., the petitioner herein, incorporated under the laws of Wisconsin with its principal and

only place of business in Milwaukee, Wisconsin, and Mountain State Construction Co., Inc., incorporated under the laws of West Virginia, with its principal place of business in Charleston, West Virginia. Petitioner filed this action in a Wisconsin State Court. Respondent removed the action to the United States District Court for the Eastern District of Wisconsin. The jurisdiction of the district court was invoked under 28 U.S.C. Section 1332 because of diversity of citizenship.

The contract required petitioner to furnish to respondent certain structural assemblies, for incorporation by respondent into the outlet works for the Gathright Dam and Reservoir in Virginia. Such assemblies were to be specifically fabricated by petitioner in accordance with detailed specifications, drawings and inspection procedures provided to respondent by the United States Army Corps of Engineers and provided in turn by respondent to petitioner. The total contract price was $1,281,750.00.

At the bidding stage, respondent was visited in its offices in West Virginia by petitioner's agents who left a quotation covering the structural assemblies. After being awarded the general contract for construction by the Corps of Engineers, respondent prepared and mailed its purchase order covering four of the bid items to petitioner in Milwaukee, Wisconsin. The purchase order incorporated by reference the petitioner's quotation. The quotation provided that "[a]ny order arising out of this proposal ... is subject to home office acceptance at Milwaukee, Wisconsin." Petitioner signed the purchase order in Milwaukee and returned it to respondent along with a letter objecting to the liquidated damages provision contained in respondent's order. There were no further actions or communications by either party with respect to this provision. The legal effect of this chronology with regard to whether contract acceptance occurred in Wisconsin or West Virginia is disputed by the parties. However, the appeliate court concluded that acceptance occured in West Virginia.

Pursuant to this contract, petitioner undertook to "furnish labor and material to detail, fabricate, stress-relieve, machine,

shop assemble, test, match-mark and ship" four hydraulically operated sluice gates and two hydraulically operated water quality control gates, "to furnish labor and material to detail, fabricate, machine, shop assemble and ship" one splash plate and one water quality outlet liner and "to furnish labor and material to detail, fabricate, machine and ship" stop logs, a pick-up beam and embedded frames, all in accordance with the Corps' drawings and specifications. (Affidavit of F. W. Hauf, dated December 20, 1973 [hereinafter Hauf Aff.] Ex. A at 2, 3 and 5.) The contract specified that the goods were to be supplied by petitioner "F.O.B. seller's plant Milwaukee, Wisconsin with freight allowed to rail siding nearest project site." It further provided that "All terms and conditions of this proposal and any transaction arising herefrom shall be governed by the law of the State of Wisconsin." (Hauf Aff., Ex. A at 1) The contract did not, by its specific terms, require the fabrication of the goods in Wisconsin.

There were telephone conversations and correspondence between petitioner in Wisconsin and respondent in West Virginia, some initiated by respondent.

Petitioner has no place of business, employees or agents resident or officed in any state other than Wisconsin. (Hauf Aff., ¶2) Respondent has no place of business, property, bank deposits, telephone, or telephone listing in Wisconsin and has never sent any officer, agent or employee to Wisconsin. It has had no contacts with Wisconsin except for those that gave rise to this action.

Petitioner fabricated the goods at its plant in Milwaukee, Wisconsin, over the course of many months, and shipped them to a siding near the construction site in Virginia. They were there received by respondent and incorporated into the project.

Subsequently, and after almost $996,000.00 of the principal balance due under the contract had been paid to petitioner by respondent, respondent withheld payment of the remainder of the purchase price on the alleged ground that the goods furnished by petitioner were defective.

Immediately prior to the commencement of this action respondent tendered to petitioner $205,985.39, which was 75% of the remaining unpaid principal balance on the contract, on condition that petitioner waive interest due under the contract. This conditional tender was refused.

Petitioner then filed this action to recover the unpaid principal balance plus interest specifically required under the contract. Service was made on respondent in West Virginia by service upon its president pursuant to Wis. Stat. Section 801.11(5)(a). After removal, respondent moved the district court to dismiss the action for lack of personal jurisdiction or, in the alternative, to transfer the case to either the Southern District of West Virginia or the Western District of Virginia. The district court denied the motion without opinion. Respondent filed an answer and counterclaim alleging breaches of the contract by petitioner. Petitioner replied to the counterclaim. After an evidentiary hearing concerning only the admissibility of certain parol evidence bearing on the scope and legal effect of a written agreement by which petitioner contended the parties had settled the issues raised by respondent's counterclaim, the district court found the evidence inadmissible and entered summary judgment in petitioner's favor.

The judgment rendered by the district court in petitioner's favor was reversed by the court of appeals on the sole ground that the district court lacked personal jurisdiction over the respondent. The court of appeals did not address the merits. It held, in summary, with principal reliance upon *Hanson v. Denckla,* 357 U.S. 235 (1958), that respondent had not conducted activities in the forum state, which it believed is required by *Hanson,* that petitioner's activity in the forum state, although "in a sense" caused by respondent's placement of the order, was nonetheless "unilateral activity" on the part of petitioner, and that there was no act by which respondent "purposefully avail[ed] itself of the privilege of conducting activities

within the forum state, thus invoking the benefits and protections of its laws," within the meaning of *Hanson.* (A. 12-13).[1]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW AS WAS RECOGNIZED BY THE COURT OF APPEALS IN ITS DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE CONTRACT ELEMENTS AND CONDUCT NECESSARY TO CONFER JURISDICTION OVER AN OUT-OF-STATE CORPORATE DEFENDANT.

In reliance upon what it conceives to be the principles established by this court in *International Shoe,* 326 U.S. 310 (1945), *McGee* and *Hanson,* the Seventh Circuit has here held that the manufacture in the forum by a resident plaintiff-seller of a substantial amount of specially fabricated goods required to be and actually shipped from the forum in response to an order placed by a nonresident defendant-buyer is not sufficient to confer jurisdiction over the defendant, at least where the contract does not specifically and explicitly require the plaintiff to manufacture in the forum state.[2]

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[1] The court said that *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957), "offers little guidance in the situation before us because that decision was based in substantial part on the special nature of the business of insurance and must be read in conjunction with the subsequent decision in *Hanson*...." (A. 6-7) (footnotes omitted).

[2] The Seventh Circuit found that the contract term specifying shipment "'F.O.B. Seller's Plant in Milwaukee Wisconsin' does not establish that the contract required [petitioner] to perform its contractual obligations at its Wisconsin plant...." (A. 13). It expressed no opinion as to whether the result would be different if the contract so required. (A. 13 n. 13).

Although noting that "in a sense" the respondent had caused the activity in Wisconsin by placing the order, the Seventh Circuit stated that, in the absence of a contract provision requiring performance in the forum, the contract involved left petitioner "in absolute control over where it would conduct that activity and it made this decision and conducted the activity unilaterally." (A. 13). While noting that the respondent caused the activity in the forum state, and assuming that respondent believed that petitioner would perform its contractual obligation in the forum (A. 13), the court, emphasizing that in its view *Hanson* requires that the defendant "conduct activities in the forum state" (A. 14), concluded that respondent did not "purposely avail itself of the privilege of conducting activities within the forum state" within the language of *Hanson.* (A. 13). It should be noticed that the decision below does not discuss or even refer to the fact that by their contract the parties agreed that Wisconsin law was to govern the transaction.

In its holding, the Seventh Circuit conceded that its decision conflicts with the decision of the Eighth Circuit in *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969), sweeping aside other "contacts" relied upon by the Eighth Circuit, many of which are present here, as insubstantial on the basis that they "would be present in almost any interstate transaction." (A. 9).

The Eight Circuit expressly held that the defendant purposely availed itself of the privilege of doing business with a Minnesota resident:

> "It entered into a transaction having an impact on the commerce of that state. By so doing, it invoked the benefit and protection of Minnesota's laws and could reasonably have anticipated that its act would have consequences in Minnesota. The fact that no agent of the defendant entered this state is not controlling [Citation omitted]." *Id.* at 369.

The Eight circuit noted that "[w]hile the contract was consummated in Texas, contractual consequences were reasonably

anticipated in Minnesota." *Id.* It further noted that the transaction was a "significant" one involving the sale and shipment of numerous units over a three week period whose value exceeded $132,000.00 *Id.* The contract here in suit exceeded that contract by more than a million dollars.

In *Electro-Craft,* it was the defendant's voluntary entry into a transaction having an impact on the commerce of the forum state that fundamentally accounts for the Eighth Circuit's holding. The Seventh Circuit squarely disagreed. Moreover, the additional factors deemed significant jurisdictional "contacts" by the Eight Circuit, *Id.* at 369, are deemed insubstantial by the Seventh Circuit.

Although not noted by the Seventh Circuit, its decision is also in direct conflict with the Sixth Circuit's decision in *In-Flight Devices Corporation v. Van Deusen Air, Inc.,* 466 F.2d 220 (6th Cir. 1972). In a case arising under the Ohio long arm statute, the Sixth Circuit concluded that what the Seventh Circuit considers "unilateral activity" by the plaintiff the Sixth Circuit considers "purposeful action" by the defendant within the meaning of *Hanson.*

In sustaining jurisdiction, the Sixth Circuit stated with referenee to the "purposefully avails" language of *Hanson:*

> *"In this Circuit* one has 'acted' so as to transact business in a state 'when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state.' Such 'acts' become purposeful if the defendant 'should have reasonably foreseem that the transaction would have consequences in that state.' [Citation omitted]." *Id.* at 226 (emphasis added).

With reference to the case before it, the Sixth Circuit said:

> "[The defendant] entered into contract negotiations involving a substantial order for the manufacture of goods with a firm which it necessarily knew was based

in Ohio and had its production facilities located within that State. That the making (and breaking) of a contract with the Plaintiff would have substantial consequences with the State of Ohio is a reality of which Defendant could not have been ignorant. [Citations omitted]." *Id.* at 227.

The court continued:

"Certainly the intentional entering into a contractual relationship with a resident of the forum state is sufficient to protect against the Hanson v. Denckla problem and so to meet the purposeful action requirement" *Id.* at 228.

The Sixth Circuit assesses whether a breach of contract cause of action arises out of the defendant's transaction of business in the forum by looking to the effects within the forum state itself. *Id.* at 229. The Seventh Circuit focuses not on the effects but on the geographical location of the events giving rise to the in-state effects. (*E.g.*, A. 12).

Lastly, the Sixth Circuit concluded that fairness did not preclude the assertion of jurisdiction in a commercial contract dispute between two corporations:

"It cannot be disputed that a state has an interest in resolving a suit brought by one of its residents. [Citations omitted]. That interest necessarily becomes more significant when, as here, a contract calling for substantial production of goods is entered into, with the production of goods and other performance under the contract to take place entirely within the forum state. [Citing, *inter alia,* the Seventh Circuit's decision in *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971)]. Holding a defendant answerable for his failure to perform the obligations imposed upon him by such a contract is consistent with Ohio's express policy of securing to its businessmen the benefit of their bargains." *Id.* at 232.

The controlling significance accorded by the Sixth Circuit to performance by the resident plaintiff in the forum state caused by a nonresident's voluntary entry into a contractual relationship with a resident squarely conflicts with the Seventh Circuit's evaluation of the identical jurisdictional contacts present in this case.

The Seventh Circuit, on the basis of *Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir. 1971), identified the Tenth Circuit as among those agreeing with its decision. *Anderson* involved the performance of a contract made by two private individuals for architectural services in the forum state. The Tenth Circuit, intimating that a contract between individuals might require more to sustain jurisdiction than one between corporations, found determinative the fact that "[n]othing in the record discloses the reasonable anticipation of contractual consequences in Oklahoma." *Id.* at 1038.

That the case involved a contract between individuals and a record which in that context the court found wanting not only distinguishes *Anderson* from the instant case but also distinguishes *Anderson* from a subsequent decision of the Tenth Circuit. In *Pedi Bares, Inc. v. P & C Food Markets, Inc.,* 567 F.2d 933 (10th Cir. 1977), the Tenth Circuit in an action between two corporations sustained jurisdiction over a nonresident buyer, where purchase orders sent by the buyer were accepted in the forum, where goods were manufactured in, and shipped from, the forum by the plaintiff and where partial payment was made to the plaintiff in the forum. The Tenth Circuit held that the requirements of *Hanson* were met in that defendant's acts (conducted wholly outside the forum) were purposeful and their consequences in Kansas reasonably foreseeable. *Id.* at 937.

Pedi Bares is both more recent than *Anderson* and presents facts which more directly reflect the Tenth Circuit's views on the

issue involved here.[3] Contrary to the Seventh Circuit's assertion, its holding conflicts with that reached by the Tenth Circuit on similar facts.

The Fifth and Fourth Circuits also conflict with the decision of the Seventh Circuit. In *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483 (5th Cir. 1974), the Fifth Circuit sustained jurisdiction over the corporate defendant where its only contact with the forum state was the mailing to the forum of reports and film the substantive work for which was done outside the United States. *Id.* at 494-499. The court deemed the requirements of *Hanson* satisfied in that defendant's contact with the forum were deliberate rather than fortuitous, i.e., "[The corporate defendant] voluntarily entered a transaction with one it knew to be a Texas resident, a transaction which had a substantial connection with Texas and which [the defendant] had reason to know could have consequences in Texas." *Id.* at 497 (footnotes omitted).

In *Ajax Realty Corporation v. J. F. Zook, Inc.,* 493 F.2d 818 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973), the court sustained jurisdiction in a breach of warranty action against a corporate nonresident defendant whose sole contact with the forum was the shipment into the forum of $37,000 worth of goods as an accommodation to a third party who had contracted with the plaintiff for their purchase. In addressing the constitutionality of the exercise of jurisdiction in this context, the court stated: "[W]e conclude that [the defendant] enjoyed a sufficient financial benefit from the use of its frames in Virginia so that it would not be unreasonable to hold that it must account in Virginia for alleged defects, at least in a case like this where the statute requires, and [the defendant] ultimately had, a reasonable expectation that the frames would be used in Virginia [Citation omitted]." *Id.* at 822.

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[3] Note that Judge Breitenstein authored both the *Anderson* and *Pedi Bares* decisions. Significantly, he made no reference to *Anderson* in his decision in *Pedi Bares.*

These conflicts in the circuits justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW CONFLICTS WITH AND THE COURT OF APPEALS RECOGNIZED THAT IT CONFLICTS WITH THE DECISION OF THE HIGHEST COURT OF THE FORUM STATE AS TO THE REQUIREMENTS OF DUE PROCESS; IT ALSO CONFLICTS WITH THE DECISION OF THE HIGHEST COURT OF THE FORUM STATE AS TO THE INTERPRETATION OF THE WISCONSIN LONG-ARM STATUTE.

The Seventh Circuit recognized "the possibility, if not the likelihood," on the basis of *Zerbel v. Federman & Co.*, 48 Wis.2d 54, 179 N.W.2d 872 (1970), *appeal dismissed*, 402 U.S. 902 (1971), that the Wisconsin Supreme Court would have sustained the assertion of personal jurisdiction over the respondent. (A. 5). In *Zerbel*, an action brought by an individual plaintiff against a corporate defendant, jurisdiction was sustained on the basis of a contract for the performance by the plaintiff in Wisconsin of professional architectural services. The initial meeting between the parties giving rise to the contract in suit occurred in Illinois. The agreement was signed by plaintiff in New York. 179 N.W.2d at 873-74. In holding that the requirements of *Hanson* were met, the Wisconsin court stated:

> "It is clear, here, that the defendant caused the consequence in the forum state wherein it contracted for services to be performed by the plaintiff, which services the trial court could reasonably infer were to be performed in Wisconsin." 179 N.W.2d at 877.

Among the bases upon which the Seventh Circuit viewed *Zerbel* as distinguishable was that it involved a contract for services rather than a contract for the sale of goods. (A. 4-5). However, the Wisconsin Supreme Court views a contract for the sale of goods as a stronger rather than a weaker case:

> "*Nature and Quality of Contacts.* Although this contact with Wisconsin did not have the effect on the commerce of the state as though defendant had taken a share in the state markets by ... purchasing goods within the state ..., the contact was such that we can conclude that defendant purposely availed 'itself of the privilege of conducting activities [in Wisconsin], thus invoking the benefits and protections of its laws.'" 179 N.W.2d at 878 [footnotes omitted].

In addition, the Wisconsin Supreme Court in cases decided after *Zerbel* has repeatedly said that facts falling within the requirements of the Wisconsin long-arm statute (the court below found the facts in this case to be within the statute [A. 6], prima facie meet constitutional demands. *E.g., Afram v. Balfour, Maclaine, Inc.*, 63 Wis.2d 702, 218 N.W.2d 288, 294 (1974); *Schmitz v. Hunter Machinery Co.*, 89 Wis.2d 388, 279 N.W.2d 172, 178-179 (1979).

Furthermore, in *Flambeau Plastics Corp. v. King Bee Manufacturing Co.*, 24 Wis.2d 459, 129 N.W.2d 237, 241 (1964), a decision dealing solely with the application of the Wisconsin long-arm statute, the court held that, in an action based upon a contract to pay for goods *to be manufactured by the seller in Wisconsin,* the action arises both out of a promise by defendant to pay for services to be performed in Wisconsin by the plaintiff and out of services actually performed in Wisconsin by plaintiff for defendant. Thus, subparagraphs (a) and (b) of what is now Wis. Stat. Section 801.05(5) also afford statutory grounds for jurisdiction. The Seventh Circuit stated that "[s]ubsections (a) and (b) are obviously inapplicable because they deal with services." (A. 6). The Wisconsin Supreme Court's holding on this issue of the construction of the *state* statute was binding on the Seventh Circuit under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

The Seventh Circuit, in holding that the personal services sections of the Wisconsin Statute were not applicable, also squarely conflicts with the holding of the Wisconsin Supreme Court on the construction of a state statute.

Thus, it is virtually certain that the Wisconsin Supreme Court would have reached a statutory construction and conclusion contrary to that of the Seventh Circuit. Furthermore, through these conflicting interpretations the court below circumvented a direct holding that the Wisconsin statute is unconstitutional under the federal Constitution. That holding would be appealable as a matter of right under 28 U.S.C. Section 1254(2).

A recognition of the conflict in state statute construction and the application of the Wisconsin Supreme Court's construction justify at least the grant of certiorari to review the judgment of the court of appeals attempting to uphold the Wisconsin Statute on the basis of a construction contrary to that given the statute by the Wisconsin Supreme Court.

III. THE DECISION BELOW CONFLICTS WITH AND WAS RECOGNIZED BY THE COURT BELOW TO CONFLICT WITH THE DECISIONS OF THE HIGHEST COURTS OF OTHER STATES AS TO THE REQUIREMENTS OF DUE PROCESS IN THIS CONTEXT.

The Seventh Circuit correctly observed that "State courts are similarly divided." (A. 10 n.9). However, the number of illustrative state court cases cited in the decision below convey neither the frequency with which state courts, like the federal courts,[4] have grappled with the considerations presented by this petition nor the extent of the conflict. The additional cases in accord with the Seventh Circuit's decision here are noted in the footnote below.[5]

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[4] The decision below also noted the conflict within the federal district courts. (A. 9-10 n.9).

[5] *E. R. Callender Printing Co. v. District Court,* 182 Colo. 25, 510 P.2d 889 (1973) (en banc); *Rath Packing Co. v. Intercontinental Meat Trad. Inc.,* 181 N.W.2d 184 (Iowa 1970); *O. N. Joanis Co., Inc. v. B.*

Cases in addition to those cited in the decision below which are in direct conflict are:

Manufacturers' Lease Plans, Inc. v. Alverson Draughon College, 115 Ariz. 358, 565 P.2d 864 (1977) (en banc) (involving a lease requiring plaintiff's best effort services);

Miller v. Glendale Equipment & Supply, Inc., 344 So.2d 736 (Miss. 1977) (involving shipment by defendant into forum under contract for goods);

McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970) (involving contract for goods);

Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970) (involving a contract for solicitation services);

State ex rel White Lumber Sales, Inc. v. Sulmonetti, 252 Or. 121, 448 P.2d 571 (1968) (en banc) (involving a contract for sale of goods);

Proctor and Schwartz, Inc. v. Cleveland Lumber Co., 228 Pa. Super. Ct. 12, 323 A.2d 11 (1974) (involving a contract for goods);

Engineered Prod. v. Cleveland Crane & Engineering, 262 S.C. 38, 201 S.E.2d 921 (1974) (involving a contract for goods and installation services).

Footnote 5 (continued)

& P. Sales Corp., 232 Ga. 256, 206 S.E.2d 437 (Ga. 1974); *Fourth Northwestern Nat. Bank v. Hilson Industries,* 264 Minn. 110, 117 N.W.2d 732 (1962); *Marshall Egg Transport Co. v. Bender-Goodman Co.,* 275 Minn. 534, 148 N.W.2d 161 (1967); *Conn. v. Whitmore,* 9 Utah 2d 250, 342 P.2d 871 (1959); *Sun-Ex International Co., Inc. v. Witt,* 413 S.W.2d 761 (Tex. Ct. App. 1967).

These conflicts further justify the grant of certiorari to review the judgment below.

IV. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS OF THE SEVENTH CIRCUIT.

O'Hare International Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971), involved a suit by the assignee of a lease of an aircraft against its guarantors. Negotiations for the lease were commenced by phone call to the lessor's Chicago office by one of the thirteen individual guarantor defendants. Subsequent discussions with one of the guarantors occurred in Illinois. The lease was deemed not accepted until executed in Illinois, payments under it were to be made at Chicago and the guarantee specified that it was to be construed according to Illinois law. The court held that personal jurisdiction over all of the thirteen defendants, none of whom was a resident of Illinois, did not offend traditional notions of fair play and substantial justice.

The Seventh Circuit stated:

> "The defendants certainly must have contemplated the effects in Illinois of a failure to make the monthly rental payment. Furthermore, the fact that the guarantee *was to be construed according to Illinois law* and performed in that state clearly demonstrates that the defendants 'invoked the benefits and protection' of the state." *Id.* at 1177 (citations omitted) (emphasis added).

The Seventh Circuit viewed the jurisdictional facts in *United States Ry. Equip. Co. v. Port Huron & Detroit R. Co.*, 495 F.2d 1127 (7th Cir. 1974), as "substantially indistinguishable" from *O'Hare*. 495 F.2d at 1129. This action involved an Illinois plaintiff-lessor's suit against a Michigan defendant-lessee to recover amounts due under a lease agreement covering four hundred railroad box cars. The lease and its

extension were solicited, without defendant's request, by plaintiff's agent at the defendant's Michigan offices. Before the lease was executed, an agent of defendant visited plaintiff's shop in Illinois for the purpose of inspecting plaintiff's facilities. After the lease's execution, the same agent returned to inspect the cars prior to delivery. The lease was found to have been accepted by defendant in Michigan. Two hundred eighty-eight of the four hundred railroad cars were repaired by plaintiff in Illinois at a facility listed in an industry Register as the home repair shop for the defendant's leased cars. The lease provided that Illinois law was to govern and required that rental payments were to be made at plaintiff's Chicago office or at such other place as plaintiff may direct.

The court stated:

> "The only significant fact present in *O'Hare* which is missing here is that in *O'Hare* the defendant initiated the lease negotiations by contacting plaintiff's assignor in Illinois. *In the context of the present transaction between corporations, involving substantial sums of money, we cannot regard such differences as controlling.* The present lease contemplated and in fact produced substantial on-going activity within Illinois, a factor apparently not present in *O'Hare.*" *Id.* at 1130 (emphasis added).

The holdings of the Seventh Circuit in these two cases cannot be reconciled with its holding in this case. In these earlier cases the fact that the agreement specified that the law of the forum would govern and that performance occurred or was to occur in the forum were held sufficient to demonstrate that the benefits and protection of the forum state had been invoked by the defendants. In this case, performance in the forum was said to be not enough. No reference was even made to the contractual requirement that the law of the forum was to govern. No reference was made to these earlier cases where the Seventh Circuit relied on the fact that the defendants expressly and in writing had voluntarily invoked the benefits and protections of the law of the forum.

This intra-circuit conflict also justifies the grant of certiorari since it relates to a recurring and important constitutional issue and is accompanied by a wide-spread conflict among the circuits, among the states and among the district courts.

V. THE DECISION BELOW MISCONCEIVES AND MISAPPLIES THE STANDARDS ESTABLISHED BY THIS COURT IN *INTERNATIONAL SHOE*, 326 U.S. 10 (1945), AND ITS PROGENY.

The decision below ignores the very realities of the modern-day conduct of commercial business between two corporations which this Court has continually reiterated compelled the adoption of the "minimum contacts" analysis. This is caused by the Seventh Circuit's implicit insistence on "purposeful" activity *by the defendant* within the forum. As a result, respondent's "purposeful" interstate acts by mail and telephone resulting in its voluntary entry into a contractual transaction with petitioner which respondent knew or believed would and which in fact did cause *substantial effects within the forum* are characterized as "unilateral activity" of petitioner and held insufficient on the basis of *Hanson*.

That the contract on which this suit is based had a substantial connection with Wisconsin, as required by *McGee*, 355 U.S. at 223, cannot be questioned. That decision, as it applies to a commercial seeting, cannot be and, it is believed, was not intended to be limited to the "special nature of the business of insurance" or similarly regulated industries. *McGee* states that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *Id.* That an industry such as insurance is regulated may, in a given case, assist in providing the required "substantial connection;" but regulation of the industry does not thereby become a necessary factor in determining whether a transaction in suit had a "substantial connection" with the forum. Indeed, the fact that the single-act long arm statutes, like the one involved in this case and like those involved in the other cases dis-

cussed or cited herein, are undoubtedly based in large measure on *McGee* reflects the considered perception that *McGee* is not properly so limited.

Hanson's admonition that more than "unilateral activity" by the resident plaintiff is required in the nature of "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," 357 U.S. at 253, was intended to insure that jurisdiction be based on a contract having substantial connection with the forum state resulting from a voluntary act of the defendant which the defendant knew, believed or should have contemplated would have such an effect within the forum. This case meets this standard, and the court below so found. (A. 13).

The decisions of this court do not require that in a commercial contract setting the defendant's voluntary and purposeful act be evidenced or accomplished by more than the use of interstate mail or telephone. To require more than is present here is to parse the words of this Court *in vacuo.*

The latest word from this Court on the subject is *Kulko v. California Superior Court,* 436 U.S. 84 (1978) (6-3 decision), involving an action for child support. Although holding that personal jurisdiction over the nonresident parent could not be sustained, the Court, in identifying what was lacking in the case before it, referred to jurisdictional facts which the Court apparently deemed sufficient. Such facts are present here. In the case at bar, respondent "purposefully derive[d] benefit from activities relating" to the State of Wisconsin, which caused an "effect" in Wisconsin, i.e., "commercial activity affecting state residents," giving rise to a cause of action arising from the "[respondent's] commercial transactions in interstate commerce." *Id.* at 96-97.

The majority decision in *Kulko* demonstrates a rationale under which the Seventh Circuit's application of the minimum-contacts test in this case is an unwarranted restriction of *Inter-*

national Shoe never intended by this Court. This restriction, if sustained, would sanction a result that is not fair, just or reasonable.

VI. THE DECISION BELOW RAISES SIGNIFICANT CONSTITUTIONAL ISSUES AND RECURRING PROBLEMS CONCERNING THE JURISDICTIONAL POWER OF BOTH FEDERAL AND STATE COURTS IN CASES INVOLVING COMMERCIAL INTERSTATE TRANSACTIONS.

Commercial interstate contracts between business enterprises frequently reach the courts. Any confusion, inconsistency or uncertainty of result imposes a serious burden upon that commerce. In that setting this case presents conflicting decisions so severe and widespread that it must be said that our federal and state courts viewed as a single, uniform system of justice do not know what due process requires in this recurring factual context.

In the almost thirty-five years since *International Shoe,* this Court has yet to decide whether and under what circumstances a single contract out of which a suit arises, other than an insurance contract (assuming *McGee* is to be so limited), having substantial connection with the forum is sufficient as a matter of due process. The lower courts at least appear to have found no helpful amplification of the *International Shoe* doctrine since this Court's decision in *Hanson* in 1958, in which, unlike *McGee* so far as the majority was concerned, the cause of action did not arise out of the defendant's contact with the forum. *Hanson,* 357 U.S. at 251.

The time has come for this Court to mark definitive guidelines in the application of *International Shoe* to the single-act commercial contract context. This Court has already awaited the perspective of time. If anything, the recent vintage of many of the decisions discussed or cited herein evidence a widening not a narrowing of the chasm. On substantially in-

distinguishable facts, the holdings vary from circuit to circuit and state to state.

Moreover, the inconsistency and uncertainty is such that, within the Seventh Circuit at least, the choice of state or federal forum in diversity actions, or indeed the selection of the panel, is literally outcome determinative. *Compare Zerbel, supra,* 48 Wis.2d 54, 179 N.W.2d 872 (1970), *and Colony Press, Inc. v. Fleeman,* 17 Ill. App. 3d 14, 308 N.E.2d 78 (1974), *and* the analysis of the Seventh Circuit's own decisions discussed above *with* the decision below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1614

LAKESIDE BRIDGE & STEEL CO.,

Plaintiff-Appellee,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 73-C-649—John W. Reynolds, *Judge.*

ARGUED JANUARY 26, 1979—DECIDED APRIL 30, 1979

Before PELL and TONE, *Circuit Judges*, and LEIGHTON, *District Judge.**

TONE, *Circuit Judge.* The issue we find decisive in this contract case is whether the due process clause of the Fourteenth Amendment allows Wisconsin to assert personal jurisdiction over a nonresident corporation that has conducted no activities in Wisconsin. We hold that Wisconsin lacks jurisdiction and reverse the judgment entered in favor of plaintiff by the district court.

Plaintiff, Lakeside Bridge & Steel Company, is a Wisconsin corporation with its principal place of business in Milwaukee. Defendant, Mountain State Con-

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* The Honorable George N. Leighton, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

struction Company, is a West Virginia corporation with its principal place of business in Charleston in that state. Mountain State has no place of business, property, bank deposits, telephone, or telephone listing in Wisconsin and has never sent any officer, agent, or employee to that state; nor has it had any other kind of contact with Wisconsin except for the events that gave rise to this action.

The contacts between the parties all occurred outside Wisconsin or by interstate mail or telephone. The contract in question called for Lakeside to furnish structural assemblies to Mountain State for use in constructing the outlet works for the Gathright Dam and Reservoir in Virginia. While Mountain State was preparing to bid on that project, it was visited in its offices in West Virginia by Lakeside's agents, who solicited the subcontract for the structural assemblies and left a proposal. After Mountain State had been awarded the contract for the construction of the outlet works, it accepted the proposal by preparing and mailing a purchase order addressed to Lakeside in Milwaukee. Lakeside made a change in the purchase order and returned it to Mountain State, which did not approve the change formally but did so by treating the modified purchase order as effective. Between the initial visit by Lakeside's agents and the return of the purchase order, and presumably afterward, there were telephone conversations between Lakeside in Wisconsin and Mountain State in West Virginia, some placed by Mountain State, and there was correspondence between the parties, some mailed by Mountain State.

The Lakeside proposal, incorporated by reference in the purchase order, provided that the goods were to be supplied by Lakeside "F.O.B. SELLERS PLANT MILWAUKEE, WISCONSIN with freight allowed to rail siding nearest project site." (The words in capitals were printed; the rest was typewritten.) Nothing was said otherwise about where the goods were to be manufactured.

Lakeside proceeded to manufacture the goods at its plant in Wisconsin and ship them to a siding near the

project site in Virginia, where they were received by Mountain State and incorporated into the construction project. Subsequently Mountain State, asserting that the goods had been found to be defective in certain respects, withheld payment of a part of the purchase price.

Lakeside then filed this action in a Wisconsin state court to recover the unpaid balance under the contract, alleging that the court had personal jurisdiction over Mountain State under the Wisconsin long-arm statute, Wis. Stat. §§ 801.05, 801.11. Mountain State removed the action to the United States District Court for the Eastern District of Wisconsin and there filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to either the Southern District of West Virginia or the Western District of Virginia. The court denied the motion, and Mountain State filed an answer and counterclaim alleging breaches of the contract by Lakeside. After calling the case for trial and selecting a jury, the court declared a mistrial and ordered a continuance. Thereafter the court held an evidentiary hearing concerning only the admissibility of certain parol evidence, found the evidence inadmissible, and entered summary judgment in favor of Lakeside. This appeal followed. Although the parties argue both jurisdiction and the merits of the summary judgment, we reach only the issue of jurisdiction.

Before coming to the principal question to be decided, we mention two preliminary matters. First, although Congress could, if it chose, extend the jurisdiction of federal courts in any kind of case subject to the federal judicial power to persons found anywhere within the United States, it has not done so. A federal court has jurisdiction over a diversity case, such as the one at bar, only if a court of the state in which the federal court is sitting would have jurisdiction. Fed. R. Civ. P. 4(e) and 4(d)(7). *See* 2 *Moore's Federal Practice*, ¶¶4.41-1[1] and 4.32[2] (1978); 4 Wright & Miller, *Federal Practice and Procedure: Civil* § 1075 (1969). Thus the jurisdictional issue in the case at bar is the same as it would have been if the case had remained in the state court from which it was removed.

The second preliminary matter concerns our role in interpreting the Wisconsin statute. Ordinarily we would be required to accept the interpretation given a state statute by the state's highest court. Here, however, the statute was intended by the state legislature to reach only so far as permitted by the due process clause of the Fourteenth Amendment to the United States Constitution and no further.[1] *Flambeau Plastics Corp. v. King Bee Mfg. Co.*, 24 Wis.2d 459, 464, 129 N.W.2d 237, 240 (1964). In these circumstances we are interpreting the statute, not ruling on its constitutionality, when we decide the due process question; yet we are of course not bound by the Wisconsin Supreme Court's determination of that federal question. *See Zerbel v. Federman & Co.*, 48 Wis.2d 54, 60, 179 N.W.2d 872, 875 (1970).

We have considered, with respect for that court's views on the federal due process question, the scholarly opinion for the court in *Zerbel v. Federman & Co.*, *supra*, 48 Wis.2d 54, 179 N.W.2d 872, in which the effect of the contract in Wisconsin was the plaintiff's performance in that state of professional services which the out-of-state defendant knew would be performed there. The court, with one justice dissenting, upheld jurisdiction, adopting a flexible due process test which was said to be based on five enumerated factors[2] but which, in the end, turned on reasonableness and fairness. That case is distinguishable from this one on several grounds: There, on two or three prior occasions, similar contracts had been entered into and performed by the parties. The defendant had initiated the negotiations. The holding as to jurisdiction was based on the personal service

[1] In this respect the Wisconsin statute is like those of a number of other states, *e.g.*, Cal. Civ. Proc. Code § 410.10 (West); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[2] Derived from then Judge Blackmun's opinion in *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965), the five factors are the quantity of the contacts, their nature and quality, the connection of the cause of action with the contacts, the interest of the forum state, and convenience. The Wisconsin court also mentioned the interest of the defendant's home state, 48 Wis.2d at 66, 179 N.W.2d at 878-879, although little, if any, weight was given that interest.

provision of the Wisconsin long-arm statute, Wis. Stat. § 801.05(5)(a),[3] and some of the important evidence, relating to the nature and value of the services, would have to come from plaintiff and his Wisconsin records. The latter fact, if no other, makes a contract for services different from a contract for the sale of goods from the standpoint of what the Wisconsin court called the "balancing of inconveniences," *see* 48 Wis.2d at 67, 179 N.W.2d at 879. Notwithstanding all this, we recognize the possibility, if not the likelihood, that that court would reach the same conclusion in a case such as the one before us.[4] It is our duty, in any event, to decide the due process issue for ourselves.

Lakeside relies upon the following provisions of the Wisconsin long-arm statute, Wis. Stat. § 801.05:

> A Court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to § 801.11 under any of the following circumstances . . .
>
> (5) . . . In any action which:
>
> (a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or
>
> (b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by

[3] As we discuss *infra*, this subsection is not applicable in the case at bar because it pertains to services rather than the manufacture of goods.

[4] The court distinguished this court's decision in *Orton v. Woods Oil & Gas Co.*, 249 F.2d 198 (1957), also a professional services case, but obviously disagreed with its due process holding, stating that the decision antedated liberalizing developments in long-arm jurisdiction. 48 Wis.2d at 68-70, 179 N.W.2d at 879-880. The dissenting judge in *Zerbel* believed that the Wisconsin Supreme Court's decision would govern a case such as the one at bar. 48 Wis.2d at 71, 179 N.W.2d at 881.

> the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or
>
> . . . .
>
> (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction; . . .

Subsections (a) and (b) are obviously inapplicable because they deal with services. In the case at bar the contract was for the sale of goods, not the rendering of services. Subsection (d), on its face, covers this case, but is subject to the due process limitation, as noted earlier.

The out-of-state defendant's contact with Wisconsin urged to be sufficient to satisfy the due process "minimum contacts" test of *International Shoe v. Washington*, 326 U.S. 310 (1945), is the ordering of goods from a Wisconsin company with knowledge that they were likely to be manufactured in Wisconsin and shipped from there. Also mentioned but less emphasized is Mountain State's use of the mail and telephone to communicate with Lakeside in Wisconsin during the negotiation and performance of the contract, and the alleged acceptance in Wisconsin of the purchase order, which Lakeside in fact modified and returned to Mountain State in West Virginia.

International Shoe, *supra*, 326 U.S. at 316, holding that due process requires only that the defendant have such "minimum contacts" with the forum state as will make the assertion of jurisdiction over him consistent with "traditional concepts of fair play and substantial justice," provides the relevant doctrine but not much assistance in solving the specific problem presented by this case. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the next decision of the Court in this area, offers little guidance in the situation before us because that decision was based in substantial part on the

special nature of the business of insurance[5] and must be read in conjunction with the subsequent decision in *Hanson v. Denckla*, 357 U.S. 235 (1958).[6] The latter opinion does provide helpful amplification of the *International Shoe* doctrine. There the Court said,

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. [Citing *International Shoe Co.*]

357 U.S. at 253.

The continuing force of this pronouncement in *Hanson v. Denckla* was confirmed in *Shaffer v. Heitner*, 433 U.S. 186 (1977), in which the principles of *International Shoe* were held to govern assertion by a state of *in rem*[7] as

[5] The Court's analysis of the relevant contacts reads as follows:

> The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality.

355 U.S. at 223.

[6] In *Hanson* the Court characterized *McGee* as being a case in which the out-of-state defendant "engaged in an activity that the State treats as exceptional and subjects to special regulation." 357 U.S. at 251. *But see Zerbel v. Federman & Co.*, *supra*, 48 Wis.2d at 61-62, 179 N.W.2d at 876-877.

[7] *See* 433 U.S. at 199 & n.17.

well as *in personam* jurisdiction. In the course of reaching that result, the Court examined *International Shoe* in some detail and then said,

> Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* [*v. Neff*, 95 U.S. 714 (1878)] rest, became the central concern of the inquiry into personal jurisdiction.

Id. at 204. After extending the *International Shoe* test thus epitomized to *in rem* jurisdiction, the Court in *Shaffer* applied that test to preclude Delaware's exercise of *in rem* jurisdiction to sequester shares of stock and stock options of officers and directors of a Delaware corporation. The Court held that "the statutory presence of [defendants'] property," consisting of shares and options, in the forum state was insufficient to satisfy the test when that property was neither the subject matter of the litigation nor related to the underlying cause of action. *Id.* at 213. The Court also held, as an alternative ground for rejecting the argument that jurisdiction was supported by Delaware's interest in supervising the management of a Delaware corporation, that this argument failed "to demonstrate that Delaware is a fair forum for this litigation." *Id.* at 214-215. In addition, the Court rejected the argument that the defendants performed "the acts required by *Hanson v. Denckla*" by accepting positions as officers or directors of the corporation and thereby receiving substantial benefits provided by Delaware law. In so doing, the Court quoted and applied the *Hanson* standard, that whether a state may assert jurisdiction depends upon whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* at 216.[8] That standard governs the case at bar.

The principal contact relied upon here as a basis for jurisdiction is performance of contractual obligations by

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[8] *Compare* Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 Wis. L. Rev. 9, 33 (quoted in *Zerbel v. Federman & Co.*, *supra*, 48 Wis. 2d at 61, 179 N.W.2d at 876), stating that this statement in *Hanson* "is probably too sweeping."

the plaintiff, not the defendant, in the forum state. The First, Seventh, and Tenth Circuits have held that this is not sufficient, by itself, to confer jurisdiction over an out-of-state defendant, at least when the contract does not require the plaintiff to perform in the forum state. *Whittaker Corp. v. United Aircraft Corp.* 482 F.2d 1079 (1st Cir. 1973) (involving contracts for goods); *Orton v. Woods Oil & Gas Co., supra*, 249 F.2d at 202 (involving a contract for professional services); *Anderson v. Shiflett*, 435 F.2d 1036 (10th Cir. 1971) (involving a contract for professional services). The Ninth Circuit has agreed with this conclusion in dictum, *see Republic International Corp. v. Amco Engineers, Inc.*, 516 F.2d 161, 167 (9th Cir. 1975) (involving contracts for services). *Cf. Galgay v. Bulletin Co.*, 504 F.2d 1062 (2d Cir. 1974) (involving a contract for goods), in which the Second Circuit held that the defendant was not transacting any business within the state for purposes of the New York long-arm statute, which had not been held coextensive with due process, *see Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68 (1965), *cert. denied sub nom. Estwing Mfg. Co. v. Singer*, 382 U.S. 905 (1966). The Eighth Circuit has reached the opposite conclusion, relying on the plaintiff's performance in the forum state and other "contacts" that would be present in almost any interstate transaction. *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969) (involving a contract for goods); *contra, McQuay Inc. v. Samuel Schlosberg Inc.*, 321 F.Supp. 902, 906 (D. Minn. 1971) (involving a contract for goods).[9]

[9] District court decisions which hold that the assertion of jurisdiction is improper under these circumstances include *Wessel Co. v. Yoffee & Beitman Management Corp.*, 457 F.Supp. 939 (N.D.Ill. 1978); *Management Service, Inc. v. Wilson Mfg. Co.*, 451 F.Supp. 963 (E.D. Wis. 1978); *Development Direction Inc. v. Zachary*, 430 F.Supp. 783 (S.D.N.Y. 1976); *Middle Atlantic States Engineering, Inc. v. Camden City Municipal Utilities Authority*, 426 F.Supp. 299 (E.D. Pa. 1977); *Jem Engineering & Mfg. Inc. v. Toomer Elec. Co.*, 413 F.Supp. 481 (N.D. Okla 1976); *United Advertising Agency v. Robb*, 391 F.Supp. 626 (M.D.N.C. 1975); *Gelderman & Co. v. Dussault*, 384 F.Supp. 566 (N.D.Ill. 1974); *Rosenthal & Co. v. Dodick*, 365 F.Supp. 847 (N.D.Ill. 1973); *Balistrieri v.*

(Footnote continued on following page)

The *Restatement (Second) of Conflict of Laws* § 50 (1971) states as follows:

> A state has power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable.

Section 50 is identical to § 37 of the *Restatement*, except that the words "a foreign corporation" are substituted for the words "an individual," so the comments to § 37 are applicable to § 50. *See Restatement, supra*, § 50, Comment *a*. Comment *a* to § 37 states that when an out-of-state "act may not have been done with the intention of causing effects in the state but could reasonably have been expected to do so," the state's power to

> exercise judicial jurisdiction . . . depends upon a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff, the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the state on the particular cause of action.

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[9] *continued*
O'Farrell, 324 F.Supp. 151 (E.D. Wis. 1971); *McQuay Inc. v. Samuel Schlosberg, Inc.*, 321 F.Supp. 902 (D. Minn. 1971); *Geneva Industries, Inc. v. Copeland Construction Corp.*, 312 F.Supp. 186 (N.D.Ill. 1970); *Oswalt Industries, Inc. v. Gilmore*, 297 F.Supp. 307 (D. Kan. 1969). District court decisions reaching the opposite conclusion include *Nordberg Div. of Rex Chainbelt v. Hudson Engineering Corp.*, 361 F.Supp. 903 (E.D. Wis. 1973); *E. R. Wagner v. Quadratec*, 332 F.Supp. 810 (E.D. Wis. 1971); *Simpson Timber Co. v. Great Salt Lake Minerals & Chemicals Corp.*, 296 F.Supp. 243 (D. Ore. 1969).

State courts are similarly divided. *Compare Belmont Industries, Inc. v. Superior Court*, 31 Cal.App.3d 281, 107 Cal. Rptr. 237 (5th Dist. 1973) *and Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959) *with Colony Press, Inc. v. Fleeman*, 17 Ill.App.3d 14, 308 N.E.2d 78 (1st Dist. 1974).

The appropriateness of exercising jurisdiction over the nonresident defendant increases, says the comment, in proportion to "the defendant's relationship to the state," which is important because of "considerations of fairness to the defendant,"[10] and "because the more closely the defendant is related to the state, the greater is the interest of the state in him and consequently the more appropriate it will be, from the standpoint of the best interests of international and interstate systems, that the state should be in a position to try the case against the defendant in its courts." *Id.* Thus, the comment states, when the defendant has other substantial contacts with the forum state in addition to the transaction in issue, an exercise of jurisdiction is more reasonable than it would be in their absence. "The plaintiff's relationship to the state is also material." The other significant factor mentioned is the nature and quality of the effects that "could have been anticipated to occur, and . . . did occur, in the state." If those effects "are not of a sort highly dangerous to persons or things, the question whether the state may exercise jurisdiction over the defendant is likely to depend at least in part upon whether the defendant has other relationships to the state."[11]

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[10] Described in this comment as primarily a matter of convenience, but elsewhere recognized to be a part of the "fair play and substantial justice" requirement that limits judicial jurisdiction to situations in which it "is fair and just" to exercise it. *Restatement (Second) of Conflict of Laws* § 24, Comment *b* (1971).

[11] The forum state has a greater interest in protecting its citizens by providing a local forum in cases which involve effects "of a sort highly dangerous to persons and things," *Restatement, supra*, § 37, Comment *a*. These would normally be product liability or other tort cases. *E.g., Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). The forum state has a lesser interest in protecting a corporation in an interstate contract dispute, especially when the corporation left the state to solicit and secure the contract, because the effects of a commercial contract are unlikely to involve danger to persons or things within the state's borders.

Applying these criteria to the case at bar, we note at the outset that Lakeside's cause of action is not one entirely "arising from these [in-state] effects," in the words of § 50 of the *Restatement*. It arises in part at least from events that occurred in West Virginia and Virginia.

More important from the standpoint of the *Restatement* analysis, in view of the fact that the events in Wisconsin were not "of a sort highly dangerous to persons or things," is the complete absence of "other relationships" between Mountain State and Wisconsin. It is the presence or absence of these other relationships upon which the state's right to "exercise jurisdiction over the defendant is likely to depend at least in part." *Restatement, supra*, § 37, Comment *a*.

When only the plaintiff has relationships to the forum state and the parties are business corporations engaged in a commercial contract dispute, another important factor comes into play, one which the *Restatement* comment calls "the best interests of the international and interstate systems." This factor is based on the proposition that "[a] state should not improperly impinge upon the interests of other states by trying in its courts a case with which it has no adequate relationship."[12] *Restatement, supra*, § 24, Comment *b*.

Viewed realistically, the contacts with Wisconsin in this case consist solely of "[t]he unilateral activity of

[12] Even the forum state, according to the First Circuit, has an "interest . . . in not discouraging foreign purchasers from dealing with resident sellers for fear of having to engage in litigation in distant courts . . . ." *Whittaker Corp. v. United Aircraft Corp., supra*, 482 F.2d at 1085, citing *Fourth Northwestern National Bank of Minneapolis v. Hilson Industries, Inc.*, 264 Minn. 110, 117 N.W.2d 732, 736 (1962); *Conn v. Whitmore, supra*, 9 Utah 2d 250, 342 P.2d 871, 874-875. Whether to prefer this interest of the forum state over others is a policy decision for that state to make, but the possibility of discouraging interstate transactions underscores the potential for unfairness in asserting jurisdiction over an out-of-state defendant who has no relationship with the forum state other than some of the effects of a contract he has entered into.

[one] who claim[s] some relationship with a nonresident defendant," and this "cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, *supra*, 357 U.S. at 253. Although Mountain State in a sense caused the activity in Wisconsin by placing the order, the contract between the parties left Lakeside in absolute control over where it would conduct that activity and it made this decision and conducted the activity unilaterally.[13] Mountain State's belief, which we may assume existed, that Lakeside would choose to perform its contractual obligations in Wisconsin does not constitute an invocation of the benefits and protections of Wisconsin's laws; Mountain State did not "purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.*; *cf. Shaffer v. Heitner*, *supra*, 433 U.S. at 216. Therefore the courts of Wisconsin no more had jurisdiction over Mountain State than would the courts of England or Taiwan if Lakeside had chosen to have the goods manufactured in either of those places.

In reaching this conclusion we have not overlooked the other facts to which Lakeside refers in attempting to strengthen its argument in support of the district court's exercise of jurisdiction. That the contract specified "F.O.B. Sellers Plant Milwaukee Wisconsin" does not establish that the contract required Lakeside to perform its contractual obligations at its Wisconsin plant and does not itself create a contact sufficient to justify the challenged assertion of jurisdiction,[14] especially when

[13] We express no opinion on whether the result would be different if the contract required the plaintiff to perform in the forum state or if the nature of the plaintiff's contractual obligations made performance in the forum state necessary.

[14] In *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583 (2d Cir. 1965), the court, while minimizing the jurisdictional significance of communication over the telephone and through the mail and of the agreement that a contract be interpreted in accordance with forum state law, found significant the contract clause requiring shipment F.O.B the forum state. At least one other fact, which has no counterpart in the case at bar, was considered significant, *viz.*, that the nonresident

(Footnote continued on following page)

considered with the words immediately following, "with freight allowed to rail siding nearest project site." The fact that Wisconsin's courts would be available to Mountain State in a suit on the contract does not constitute a meaningful relationship between that company and that state. If Lakeside had conducted no activities related to the contract in Wisconsin, the courts of that state would nonetheless have had jurisdiction over a suit brought against Lakeside by Mountain State, as would the courts of any other state in which Lakeside was doing business. *See Restatement, supra*, § 47(2). Use of the interstate telephone and mail service to communicate with a Wisconsin plaintiff, if constituting contacts supporting jurisdiction, would give jurisdiction to any state into which communications were directed. The sending of the purchase order to Wisconsin does not significantly aid jurisdiction, especially when it was modified by Lakeside and eventually accepted as modified in West Virginia through Mountain State's acquiescence. In any event, formalities of contract execution are not determinative for purposes of jurisdiction. *See Restatement, supra*, at 106-107, 150-151. Finally, the dollar amount of the transaction can hardly be a principled basis for distinguishing between one case and another, let alone for ignoring the requirement, stated in *Hanson* and reiterated in *Shaffer*, that the defendant, not the plaintiff, conduct activities in the forum state.

---

[14] *continued*
defendant owned or leased the trucks that transported the goods. To the extent that the *Agrashell* decision relies heavily on the contact created by the F.O.B. term, we disagree. If "[t]he law relating to the passage of risk in the sale and carriage of goods . . . is directly relevant to the policies governing personal jurisdiction over foreign corporations," *id.* at 589, we question at least the weight to be given that factor. If the presence of goods on which the defendant bears the risk of loss in a state is a sufficient contact to give that state jurisdiction over the defendant, as the *Agrashell* opinion seems to suggest, *id.* at 588-589, any state through which the goods pass in transit could exercise jurisdiction over the defendant. Such a holding would constitute an unwarranted expansion of the due process limits on the exercise of jurisdiction.

Mountain State's motion for dismissal or transfer on the ground that the court lacked jurisdiction was well founded. The judgment is reversed, and the case is remanded with directions to vacate the judgment and either to dismiss the case or to transfer it to another district in which it might have been brought.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Opinion by Judge Tone

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 30, 1979

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. GEORGE N. LEIGHTON, District Judge*

LAKESIDE BRIDGE & STEEL COMPANY,
Plaintiff-Appellee,

No. 78-1614 vs.

MOUNTAIN STATE CONSTRUCTION COMPANY, INC.
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 73-C-649

John W. Reynolds, *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, with costs, in accordance with the opinion of this court filed this date.

---

* The Honorable George N. Leighton, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1979

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. GEORGE N. LEIGHTON, District Judge*

LAKESIDE BRIDGE & STEEL COMPANY
Plaintiff-Appellee,

vs.

MOUNTAIN STATE CONSTRUCTION CO., INC.
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of

No. 73-C-649

John W. Reynolds, *Judge*

No. 78-1614

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable George N. Leighton, District Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF WISCONSIN

LAKESIDE BRIDGE & STEEL CO.,

Plaintiff,

ORDER

vs.

CIVIL ACTION
MOUNTAIN STATE CONSTRUCTION COMPANY, NO. 73-C-649

Defendant.

The defendant in the above captioned action having moved the Court to dismiss or transfer the action; and the plaintiff in the above captioned action having moved the court to advance on its Inventory of Cases Pending Decision defendant's Motion to Dismiss or Transfer; and both motions having come on for hearing before the court on September 6, 1974; and the parties appearing by their attorneys Elwin J. Zarwell and Christopher N. Knight of Quarles & Brady for the plaintiff and Ward Dunphy of Kluwin, Dunphy, Hankin & McNulty for the defendant; and the Court having reviewed the pleadings, affidavits and briefs, and being duly advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED:

That plaintiff's Motion to advance on the Court's Inventory of Cases Pending Decision defendant's Motion to Dismiss or Transfer be and the same is hereby granted.

That defendant's Motion to Dismiss or Transfer be and the same hereby is denied in all respects.

That costs, if any, be held in abatement until final determination of this action.

Dated this 8th day of September, 1974.

BY THE COURT:

/s/ John W. Reynolds
JOHN W. REYNOLDS
Chief Judge

Supreme Court, U. S.
FILED
DEC 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-376

LAKESIDE BRIDGE & STEEL CO.,

Petitioner,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

There was no District Court opinion concerning the question of jurisdiction. The Seventh Circuit Court of Appeals' opinion is reported in 597 F.2d 596.

JURISDICTION

The jurisdictional requisites are stated in the petition.

QUESTION PRESENTED

Whether a Wisconsin Court has jurisdiction of a West Virginia defendant in a civil case solely because the Wisconsin plaintiff has elected to manufacture certain assemblies for the West Virginia defendant in the State

of Wisconsin the West Virginia defendant having no contacts with the State of Wisconsin?

STATUTORY PROVISIONS INVOLVED

The statutes involved are as set forth in the petition.

STATEMENT OF THE CASE

This is a civil action commenced in the Circuit Court, Civil Division, Milwaukee County, Wisconsin by Plaintiff, Lakeside Bridge and Steel Co., hereinafter sometimes referred to as "Lakeside" against defendant, Mountain State Construction Co., Inc., hereinafter sometimes referred to as "Mountain State". Lakeside is a Wisconsin corporation with its principal office in Milwaukee and Mountain State is a West Virginia corporation with its principal office in Charleston, West Virginia.

On July 28, 1970 Lakeside and Mountain State entered into a contract under the terms of which Lakeside was to supply to Mountain State structural assemblies for incorporation by Mountain State in the Outlet Works for the Gathright Dam and Reservoir in Virginia. Lakeside seeks to recover a balance claimed due on said contract.

Mountain State removed the case to the United States District Court for the Eastern District of Wisconsin, and filed its Motion to Dismiss for lack of personal jurisdiction or in the alternative to transfer the case to the Southern District of West Virginia or the Western District of Virginia. The Court denied the motions without opinion.

Mountain State filed its answer in which it denied that Lakeside had fulfilled its contract and counterclaimed alleging that the failure of Lakeside to fulfill

the terms of the contract had caused damage to Mountain State.

In answering Mountain State's counterclaim Lakeside denied any breach of contract and by way of affirmative defense alleged that all differences between the parties had been compromised in negotiations culminating in a written agreement of August 23, 1973 and attached a copy of the agreement to its answer.

Lakeside then filed a motion for summary judgment. That motion was heard and decided on the affidavit of Gordon C. Behnke for Lakeside, and the counter-affidavit of Dean E. Lewis, Don DeBrular, and Romie Swanson, for Mountain State. The Court denied plaintiff's motion. 400 F. Supp. 273 (E.D. Wis. 1975).

The parties went through the Court's pre-trial procedures, filed a stipulation of uncontested facts, and on March 21, 1977 appeared in Court and selected a jury for trial. On April 4, 1977 the Court released the jury because of another conflicting jury trial and declared a mistrial.

Plaintiff filed a motion requesting a conference to consider referring defendant's counterclaim to a special master. That conference was held and the Court determined that there should be an evidentiary hearing to determine the admissibility of parol evidence.

That evidentiary hearing was held on October 31, 1977.

On March 23, 1978, the Court issued its Decision and Order granting Lakeside summary judgment on its claim and dismissing Mountain State's counterclaim. 446 F. Supp. 1163 (E.D. Wis. 1978).

Mountain State appealed challenging the ruling of the District Court both on the question of the court's jurisdiction and the merits of the case. The Court of Appeals for the Seventh Circuit reached only the jurisdictional question and held that the District Court was without jurisdiction. 597 F. 2d 596 (C.C.A. 7 1979).

Mountain State's Motion to Dismiss for lack of personal jurisdiction was supported by the affidavit of Dean E. Lewis. That affidavit establishes without contradiction that Mountain State is a West Virginia corporation with its principal office in the City of Charleston, West Virginia and that it has no office, telephone or other place of business in Wisconsin; that it has at no time sent any officer, agent or employee to Wisconsin; owns no real or personal property in Wisconsin; has no bank deposits and has borrowed no money in Wisconsin; has not entered into contracts to be performed in Wisconsin; has never litigated either as a plaintiff or defendant within the State of Wisconsin and is otherwise without contact with the State of Wisconsin.

In connection with the transaction here in issue, Lakeside's agents called upon Mountain State at Mountain State's offices in West Virginia, left their proposal and solicited Mountain State's business in West Virginia. After Mountain State was awarded a contract for the construction of portions of the Gathright Dam, it prepared a purchase order which it mailed to Lakeside in Milwaukee. Lakeside made certain changes in Mountain State's purchase order and returned it to Mountain State in West Virginia where it was accepted. Mountain State had no knowledge or information as to where the components were to be manufactured and assembled

and the contract contained no requirements in that regard.

Insofar as Lakeside is concerned, the jurisdictional facts appeared in the affidavit of F. W. Hauf. That affidavit makes the following points:

1. That the materials to be supplied by Lakeside were to be supplied f.o.b. plaintiff's plant. It should be noted that the proposal of Lakeside attached to the affidavit provides that the material is to be supplied "F.O.B. Sellers Plant, Milwaukee, Wisconsin (Printed) with freight allowed to rail siding nearest project site." (Typed)

2. That in the course of dealing between the parties, Mountain State mailed correspondence and contract documents and placed telephone calls to plaintiff at its office in the City and County of Milwaukee, Wisconsin.

No where in the record is there any suggestion that Mountain State at any time had any contact with the State of Wisconsin.

It does appear in the record that Mountain State's contract was with the U. S. Army Corps of Engineers and accordingly would require a Miller Act bond to protect suppliers such as Lakeside. 40 U.S.C.A. 270a. However, actions on the bond are permitted only in the district where the improvement is located, in this instance, the Western District of Virginia. 40 U.S.C.A. 270b. We believe that this is persuasive of the fact that the parties contemplated that litigation would be in the Western District of Virginia.

ARGUMENT

1. On the Undisputed Facts of the Case There is No Basis for Jurisdiction in Wisconsin.

There is little or no disagreement as to what the facts are although there is controversy as to what legal conclusion is required by the facts.

For example, it is agreed that the contract provided that the materials to be supplied by Lakeside were to be supplied:

> "F.O.B. Seller's Plant, Milwaukee, Wisconsin (Printed) with freight allowed to rail siding nearest project site." (Typed)

Petitioner says that this provision required that the materials be shipped from Milwaukee, (p. 7 Petition) a conclusion contrary to that of the Court of Appeals. 597 F. 2d at p. 603.

We believe that the F.O.B. provision is intended to determine who has the responsibility for arranging and paying for the transportation of the materials. In view of the fact that the typed words render the printed words meaningless and without any possible application, the conclusion of Court of Appeals is clearly right.

If petitioner had elected to manufacture the parts contracted for or to have them manufactured in Virginia, no one would contend that they had to be shipped through Milwaukee in order to comply with the contract. The only importance of the place of shipment to either party is the cost and responsibility for shipment. Inasmuch as Lakeside assumed the responsibility and cost to the siding "nearest the job site", the printed words "F.O.B. Seller's Plant, Milwaukee, Wisconsin * * *" are without any force or meaning.

The original Lakeside proposal provided that Wisconsin law would govern the transaction. While respondent believes the District Court was in error in holding that the proposal was a part of the contract, even if it was there is no reason why a West Virginia or Virginia Court could not apply the Wisconsin law.

The only other contacts initiated by Mountain State and relied upon by Lakeside in support of the Wisconsin court's jurisdiction are correspondence and telephone communications between Lakeside and Mountain State, some of which were initiated by Mountain State.

Petitioner concedes that the contract did not require that the goods ordered be fabricated in Wisconsin, (p. 5 Petition), but relies upon the fact that Lakeside elected to manufacture them there in support of the jurisdiction of the Wisconsin court.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court said:

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington 326 U.S. 310, 90 L. Ed. 95, 103, 66 S. Ct. 154, 161 A.L.R. 1057."
>
> 357 U.S. at 253.

Indeed the Court undertook to guard against just such

a situation as is here urged by Petitioner when it decided *International Shoe v. Washington*, 326 U.S. 310 (1945):

> " 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.
>
> * * * *
>
> Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.
>
> * * * *
>
> To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.
>
> * * * *
>
> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less.
>
> * * * *
>
> Whether due process is satisfied must depend rather upon the quality and nature of the activity

> in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. *That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.* * * * *" (Emphasis added)
>
> 326 U.S. at 317.

In this case plaintiff seeks to do that which is expressly forbidden in the *Hanson* case. Plaintiff sought out the defendant in the defendant's home jurisdiction and initiated a course of action which resulted in a contract for the purchase of materials by the defendant from the plaintiff. Insofar as the terms of the contract are concerned, plaintiff could have had the materials so ordered fabricated anywhere in the world, so long as they met the defendant's specifications. There is no indication anywhere in the record that the defendant knew or cared where the materials ordered were manufactured. The fact is that plaintiff appears to have chosen to manufacture the materials in Wisconsin, a decision by the plaintiff and an activity of the plaintiff. This "unilateral activity" of the plaintiff should not subject the defendant to the jurisdiction of courts in a distant state.

2. The Uncertainty Inherent in the Flexible Standard of International Shoe v. Washington Makes the Reconciliation of the Decided Cases Difficult But Does Not Warrant a Granting of Certiorari in the Present Case.

In *Shaffer* v. *Heitner,* 433 U.S. 186 (1977), this Court recognized that the application of the International Shoe standard to in rem cases necessarily makes the jurisdiction of the courts less certain than it would be if the Court simply held that the existence of the res within

the jurisdiction of the forum warrants the exercise of jurisdiction. 433 U.S. at 211.

Certainly, the same can be said with regard to the imposition of the International Shoe standard in cases involving in personam jurisdiction.

We think that no helpful purpose would be served by trying to analyze all of the Court of Appeals cases cited in the petition. The flexible standard applied in each of the cases render them subject to different analysis and interpretation. For example, the Court of Appeals and petitioner say that *Electro-Craft v. Maxwell Electronics Corp.*, 417 F. 2d 365 (C.C.A. 8 1969), are contrary to the holding in the instant case, (p. 8 Petition), but that action involved a Minnesota buyer in an action against a Texas seller in a Minnesota Court. The Eighth Circuit Court emphasizes this fact and suggests that a different result might be called for if the action were by a Minnesota seller. 417 F. 2d at 368.

The petitioner cites *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F. 2d 220 (C.C.A. 6, 1972), as being in conflict with the decision in this case, however, the Court of Appeals for the Seventh Circuit approved and undertook to follow the *Van Dusen* decision in *Spiegel, Inc. v. F.T.C.*, 540 F. 2d 287, 291 (C.C.A. 7, 1976). Further, in the *Van Dusen* case, it is obvious that the defendant went to the forum state to inspect the production facilities of the plaintiff and otherwise had many contacts with the forum state which are not present in the instant case.

The petitioner says that the decision in this case is in conflict with the decision of the Seventh Circuit in *O'Hare International Bank v. Hampton*, 237 F. 2d 1173 (C.C.A. 7 1971), however, that case had nothing to do

with buying or selling personal property, but rather with the proper forum to try a case involving the lease of an air-craft and the guarantors on the lease. It should be noted that Judge Pell wrote that decision as well as the decision on the instant case, and apparently does not perceive any conflict in the decisions.

The petitioner asserts that the Court of Appeals has failed to follow the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (p. 16 Petition), in holding that certain portions of the Wisconsin Long Arm Statute do not apply to the transaction here in issue. It should be noted, however, that the error, if any, has nothing to do with the outcome of the case inasmuch as the Court of Appeals found that another portion of the Wisconsin Long Arm Statute does reach the defendant if the minimum contacts required by the Fourteenth Amendment are present.

We do not believe that any one of the cases cited by the petitioner would sustain jurisdiction on the undisputed facts of this case. The respondent did absolutely nothing in the forum state. The petitioner relies upon the election of the petitioner to manufacture the articles in question in the forum state as an activity of the respondent in the forum state. Obviously, the only activity in the forum state was that generated by the petitioner's election to function in the forum state, an election in which the respondent had no part.

CONCLUSION

For these reasons, certiorari should be denied.

Respectfully submitted,

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December 8, 1979

Supreme Court, U. S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-376

.....

LAKESIDE BRIDGE & STEEL CO.,

Petitioner,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Respondent.

.....

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

.....

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

.....

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December 18, 1979

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-376

.....

LAKESIDE BRIDGE & STEEL CO.,

Petitioner,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Respondent.

.....

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

.....

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

.....

Respondent's statement of the question presented misleadingly creates the impression that petitioner selected from among several of its plants and chose at its option to fabricate in and ship from the forum state the $1,281,750.00 worth of custom fabricated, specially designed steel components involved in this action.

To flesh out this impression, respondent asserts that it "had no knowledge or information as to where the components were to be manufactured and assembled" and that "[t]here is no indication anywhere in the record that respondent knew or

cared where the materials ordered were manufactured." (Brief in Opp., pp. 4,9) These assertions are not supported by the record.[1]

While respondent correctly notes that petitioner's principal office is in Milwaukee, Wisconsin, nowhere does respondent state, as was pointed out in the petition (p.5), that the record establishes that petitioner has no place of business, [plant], employees or agents resident or officed in any state other than Wisconsin. (Hauf Aff., ¶2) Petitioner's quotation, which was delivered to respondent in West Virginia, bore the Milwaukee address of petitioner's sole place of business, provided for shipment f.o.b. *Seller's Milwaukee Plant* and provided that Wisconsin law would apply. Respondent's subsequent purchase order for the bid items manufactured by petitioner, which incorporated the terms of the quotation by reference with the language "per your quotation," was undisputedly mailed by respondent to petitioner at its sole place of business in Milwaukee.

The import of the contract term "FOB Seller's Plant Milwaukee, Wisconsin with freight allowed to rail siding nearest project site" is that it not only establishes from where the parties contemplated shipment would be made but also evidences respondent's awareness that petitioner's *plant* was located in Milwaukee, Wisconsin.

Respondent, like the court below, ignores all of the foregoing and presents the view that, in addition to interstate acts by mail and telephone, coupled with the inducement of substantial activity within the forum and the express invocation of the law

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[1] Note that in its Brief in Opposition (p.4), respondent states that the affidavit of its president "establishes without contradiction that [respondent] has not entered into contracts to be performed in Wisconsin[.]" In fact, this affidavit states only "[T]hat defendant, . . . has entered into no contracts to be performed *by it* within the State of Wisconsin[.]" (Emphasis added) (Lewis Aff., pp. 1-2)

of the forum, the constitutional assertion of jurisdiction requires specific physical activity and presence *of the defendant* within the forum. That is not the law as established by this Court! (See petition, pp. 19-21)

It is presumably only in this narrow context that respondent says that this case involves a defendant "having no contacts" with the forum state. Respondent cannot otherwise accurately state that "[n]owhere in the record is there any suggestion that Mountain State at any time had any contact with the State of Wisconsin." (Brief in Opp., p. 5) Such assertions are belied by respondent's own efforts to demonstrate the insufficiency of those contacts with the forum which in fact are present and which the court below itself addressed.[2]

While respondent has restated what it would like to be the operative facts and ignored the forum contacts relied upon by petitioner, the importance and substantiality of the question presented in the petition, the conflict with the decisions of the highest court of the forum state and the conflict with the decisions of the highest courts of other states are not denied or disputed in respondent's response. Respondent even concedes that reconciliation of the decided cases is difficult. Regarding the conflict among the federal Courts of Appeals, respondent merely concludes that full analysis would serve "no helpful purpose."

With the exception of an effort to distinguish the cases addressed below, respondent attempts no analysis whatsoever.

As to the first case respondent attempts to distinguish, *Electro-Craft v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th

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[2] This mischaracterization explains respondent's reliance upon the following sentence from *International Shoe* italicized at page 9 of its brief: "[The due process clause] does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has *no contacts, ties or relations.*" (emphasis added)

Cir. 1969), the court below, unlike respondent, clearly and correctly did not view the case distinguishable, either on the basis suggested by respondent or on any other basis. The resident buyer — resident seller distinction to which respondent refers was fashioned by the Minnesota state courts as a consideration bearing only on the state law question of whether the Minnesota long-arm statute applies to a given transaction. Since this distinction has not been recognized or accorded any significance by the Wisconsin courts in determining the application of Wisconsin's long-arm statute, there was no reason for the court below to make any reference to it. In *Electro-Craft,* the court appropriately notes it in dealing with the state law question. The court *then* "turn[ed] to the due process question," *Id.* at 368, for the remainder of its decision and made no further reference to it.

Respondent next attempts to distinguish *In-Flight Devices Corp. v. Van Dusen Air, Inc.,* 466 F.2d 220 (6th Cir. 1972), which the Seventh Circuit has previously cited with approval in *Spiegel, Inc. v. F.T.C.,* 540 F.2d 287, 291 (7th Cir. 1976). In doing so, respondent relies on the fact that in *Van Dusen* defendant inspected production facilities in the forum and otherwise had "many contacts" not present here. However, contrary to respondent's implication, the defendant's inspection of plaintiff's production facilities in the forum state was not identified by the *Van Dusen* court as a key factor in its analysis and holding.[3] Respondent does not identify the other "many con-

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[3] The decision below has already been read and applied in a manner which would render this purported distinction immaterial. In at least three subsequent district court decisions involving facts similar to those present here it was held, with reliance on the decision below, that personal jurisdiction could not constitutionally be sustained despite the fact that the respective defendants had made forays into the forum to inspect production facilities, to negotiate the contract or to review contract specifications. *Wisconsin Electrical Manufacturing Co. v. Pennant Products,* 472 F.Supp. 855, 858 (E.D. Wis. 1979); *Met-L-Wood Corp. v. Lifetime Pools, Inc.,* 475 F.Supp. 149, 152 (N.D. Ill. 1979); and *W. A. Krueger Co. v. Ottenheimer Publishers, Inc.,* No. 78-C-322, slip. op. at 2-3 (E.D. Wis. October 17, 1979).

tacts" which it says were present in *Van Dusen* but are not present here; but they are undoubtedly those on which the Sixth Circuit expressly noted that it was not relying in reaching its decision. 446 F.2d at 235 n. 26.

Respondent then notes the difference between the type of transaction involved in this case and that involved in *O'Hare International Bank v. Hampton,* 437 F.2d 1173 (7th Cir. 1971). However, as pointed out in the petition (p. 18), this difference does not explain the fundamental conflict inherent in the fact that jurisdictional contacts (namely, that the agreement specified that the law of the forum would govern and that performance occurred or was to occur in the forum) deemed sufficient in *O'Hare* were deemed insufficient in the decision below.[4]

Respondent does not dispute petitioner's contention that the court below acted contrary to *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). Rather respondent speculates, contrary to the tenor of the opinion below and the Wisconsin cases cited in the petition, that the outcome would not have been different if the court had followed state law. The court below, in holding contrary to Wisconsin case law that the contract for services provisions of the Wisconsin long-arm statute did not apply, expressed the view that a contract for services is different from a contract for the sale of goods at least "from the standpoint of . . . the 'balancing of inconveniences[.]'" (Petition A. 5) The services in fact performed by petitioner in Wisconsin over the course of many months, but disregarded by the court below, included customized fabrication and plant assembly of the goods by petitioner as well as plant inspection of the goods by both petitioner and the owner who bought the components from respondent and contracted with and through respondent for that activity to be performed in the Wisconsin plant.

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[4] Judge Pell who wrote the decision in *O'Hare* did not write the decision in this case, as respondent erroneously states.

The court's failure to consider such services had, or certainly ought to have had, an impact on its assessment of the quality and nature of the contacts, ties and relations which respondent had with the forum and petitioner. Furthermore, because of this erroneous approach by the court below, three and not just one of the bases for jurisdiction deemed constitutionally sufficient by the Wisconsin legislature and held to be sufficient by the Wisconsin Supreme Court have been constitutionally impugned.

The position of both respondent and the court below is apparently based in part upon the fact that the contract did not expressly require performance in Wisconsin. Therefore, whether the performance by the plaintiff in the forum must be *expressly required* by the contract or whether it is enough that the defendant knew, contemplated or *believed that it would occur there* is among those issues which this Court should address both to resolve the conflict in the decisions and to afford much needed guidance to our courts.[5]

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[5] In the cases cited in note 3 *supra,* the contracts involved did not require performance in the forum. On the basis of the decision below, jurisdiction was not sustained despite the fact that in each case the district court found that the defendant knew, was aware or must have assumed that performance was to occur in the forum.

See *Biltmoor Moving and Storage Co. v. Shell Oil Co.*, 606 F.2d 202, 207 (7th Cir. 1979), where the Seventh Circuit recently said, in a case in which it found this distinction "immaterial" because the contract involved "absolutely required performance" in the forum: "Illinois courts have not always distinguished between situations where the contract requires performance in Illinois and situations where, although the contract is silent, the defendant knows in advance that performance will take place in Illinois."

The response to the petition substantially confirms its merit. The need for this Court's review of the decision below is manifest.

Respectfully submitted,

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